IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

THE STATE OF RAJASTHAN. V. BHAKHAR SINGH & ANOTHER

D. B. CRIMINAL APPEAL NO. 284/85

Under Section 378 (iii) (i), Cr.P.C.,against the Judgment dated 07.05.1985 passed by the learned Sessions Judge, Balotra, Camp - Barmer, in Sessions Case No.11/85.

DATE OF JUDGMENT :::: 17-09-2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI

Mr. J.P.S.Choudhary, P.P., for State – appellant.
Mr. Doongar Singh, for respondents.

BY THE COURT: (PER HON'BLE BHANDARI, J.):-

This appeal is directed against the judgment 7th May, 1985, passed by the Sessions Judge, Balotra Camp at Barmer, in Sessions Case No.11/85.

The prosecution case was started by submission of report by Rehmata with Police Station, Barmer, at 10.40 P.M., on 09.11.984. Rehmat stated that his agriculture farm exists in village Daruda. Few villagers, namely, Bhakhar Singh, Lal Singh, Sujan Singh, Hanwant Singh, Kamal Singh, Shaitan Singh, Jath Lal, Sattar and Sumer were keeping enmity with him as he had lodged a private complaint against these persons. It was further stated that even they were having dispute in regard to a land. Today, at around 6 – 6.30 P.M., when he and his father Azim Khan were going towards their Dhani from their agriculture farm, then, on the way, while they were crossing Sujan Singh's agriculture field, Bhakhar Singh having a Lathi, Lal Singh a "Dharia" and one unknown person, having a lathi, hide themselves behind the sand-dune, charged them, when he and his father came close to them. All of those persons came to kill him. His father prayed for mercy with followed hands, but accused did not agree for the mercy. Complainant, having a lathi in his hand, saved himself by keeping all the accused away. At that time, he and his father made noise for saving themselves. Hearing the noise, Hussain and Luna came on the spot. When the accused could not kill him, then, they attached on his father Azim Khan with a lathi and axe. Deceased Azim Khan died, after some time. Accused, thereafter, charged the complainant

and, at that stage, Hussain and Luna tried to same them, but accused killed his father by giving blows from lathi.

Police registered the said FIR , bearing No.297/84 under Section 302 of IPC. After registration of the First Information Report, usual investigation was conducted by the police and, thereafter, a challan was filed in the Court of the Judicial Magistrate, Barmer under Sections 302 and 302/34 of IPC. The trial Court, thereafter framed charges against the accused under Sections 302 and 302/34 of IPC. Accused denied the charges and claimed trial.

At the trial, prosecution recorded statements of eight witnesses and produced twenty documents. In defence, statement of Jethmal (D.W.1) was recorded, whereas eight documents were exhibited. The statements of the accused were recorded under Section 313 of Cr.P.C. The learned trial Court, vide its judgment dated 7th May, 1985, acquitted accused Lal Singh by giving him benefit of doubt, whereas accused Bhakhar Singh was convicted under Sections 323 and 352 of IPC.

Learned Public Prosecutor urged that despite of availability of three eye witnesses and their statements, the impugned order has been passed by the learned trial Court, based on perverse

finding. It was, thus, prayed that the judgment of the trial Court be set aside and the accused be convicted and sentenced under Sections 302 and 302/34 of IPC.

Per contra, learned counsel appearing for the non-appellants submitted that the prosecution could not prove their case beyond doubt, inasmuch as, statements of eye witnesses were found to be doubtful, in view of the finding recorded by the trial Court, therefore, one cannot be convicted on the basis of doubtful statements. The learned counsel further urged that even medical evidence has not supported prosecution case, apart from the fact that even presence of two eye witnesses itself is doubtful. In those circumstances, the learned counsel prayed that the appeal preferred by the State is of no substance, therefore, same deserves to be rejected.

We have carefully examined the matter by perusal of record and also in the light of the arguments made by both the leaned counsel for the parties.

The prosecution mainly relied on the statements of three eye witnesses, namely, Rehmata (P.W.2), Luna (P.W.3) and Hussain (P.W.8), who are said to be the eye witnesses of occurrence. Thus, the best case of the prosecution rests on the

statements of these three witnesses.

PW 2 Rehmata, in his statement, stated that he and his father deceased Azim Khan were going to their Dhani from their agriculture farm at 6.00 P.M., on 08.01.1984. They were followed by one Luna and Hussain. When both of them reached close to Sujan Singh's farm, Bhakhar Singh, Lal Singh, Deram Bhil, Kamal Singh and Sawai Singh were found hiding behind the sand-dune. Out of five, Bhakhar Singh and Lal Singh came out. Lal Sing was having an axe like a "Dharia" and Bhakhar Singh was having a lathi. Both of them abused him, but witness saved him as he was having a lathi and, in that process, even Bhakhar Singh and Lal Singh sustained injuries. He saved himself and, at that stage, assailant caused injuries to his father Azim Khan. Lal Singh caused a blow on the left side of ribs by a "Dharia" and Bhakhar Singh caused injury on right thigh of deceased Azim Khan by a lathi. Even Kamal Singh had also used lathi. Deceased died out of this incident. In the cross-examination, the witness admitted that Luna and Hussain were following them at the distance of 6 to 7 yards, but both of them did not save them as they remained standing at a distance. Witness further admitted that Luna is not having his field nearby the place of occurrence and Hussain's field exists about 2 miles away from the spot. The witness was confronted with the

document (Ex.D-1) to show that he had not attributed any fact against Kamal Singh and further that police statement does not contain a statement to the effect that Lal Singh caused injury to his father by a Dharia on left side of ribs and, thereafter, Bhakhat Singh used lathi, causing injury on the right thigh of deceased Azim Khan. Thus, it has been seen that the witness has made improvement in his Court statement.

PW 3 Luna stated that on the faithful day of occurrence, when he and Hussain were returning back to their village, then, near Sujan Singh's field, they had seen Bhakhar Singh and Lal Singh causing injuries to deceased Azim, Kamal Singh and other two were found sitting behind the sand-dune and, thereafter, Kamal Singh also charged deceased Azim. Thereafter, they returned back to village and informed two villagers about the incident, but they had not gone close to the dead body, but remained sitting at a distance. In the cross-examination, the witness admitted that he and Hussain went out for work only for 4 – 5 days back, but did not disclose the name of the Contractor with whom they were working. In the police statement, said witness stated that he in fact was working in the field with the help of axe and while returning back, he left that axe in the field, so that he could work again in the field on the following day.

PW 8 Hussain, in his statement, stated that he had seen Rehmata and Bhakhar Singh fighting with each other and, at that time, Rehmata save him and, thereafter, Bhakhar Singh and Lal Singh killed deceased Azim Khan by a Dharia and lathi. Lal Singh was having a Dharia and Bhakhar Singh was having a lathi. In the cross-examination, the witness admitted that he did not save them and after occurrence, they left the place first and, thereafter, accused left the place. They have not taken care of deceased Azim. In the police statement, witness had not stated that Lal Singh used Dhariya and Bhakhar Singh a lathi.

To see the medical evidence, statement of PW 1 Dr.M.M.Purohit is quite material. In his statement, witness stated that the external injuries sustained by deceased Azim were not sufficient to cause death in the normal circumstances. However, combination of external and internal injuries was sufficient to cause death. In the cross-examination, witness admitted that Board was constituted to prepare post-mortem report on his request as it was not considered to be a case of murder. In the post-mortem report, following injuries were reported on the person of deceased :-

"A. Ante-mortem lacerated wound 3 cm x 3 cm x muscle deep on right thigh 8 cm above right thigh 8 cm above right knee joint on anterior aspect, with haematoma 8 cm x 7 cm around it.

B. Ante-mortem abrasion 1 cm x 1 cm on dorsal side of lower 1/3 of left forearm.

D. Ante-mortem bruise on right side of the upper part of chest at level of 4th and 5th rib size 10 cm x 4 cm extending transversely from above the nipple to laterally towardes axilla.

D. Ante-mortem abrasion 5 cm x 5 cm at left nostril at lower part."

The cause of death given in the post-mortem report is due to shock and haematoma on right lung.

After considering the evidence, the learned trial Court held that out of three eye witnesses, presence of two witnesses, namely, Luna and Hussain is doubtful. The reason given for the said purpose is not only delay in recording their police statement, but even for the reason that if they were present at the spot, then, having relations with the deceased could not have kept themselves away, making no effort to save Rehmata and deceased Azim. The trial Court further considered that if Luna and Hussain were present on the spot, then accused being the three persons, could have tried to save deceased Azim by forming equal number of persons. The learned trial Court further considering the fact that these two witnesses are relatives of

deceased and otherwise, their presence is not natural, because Luna was not having any field in nearby area and Hussain's field was two miles away from the place of occurrence. Careful examination of statements of all the witnesses, we find that the presence of witnesses Luna and Hussain seems to be doubtful as their act is not found to be natural in view of the statements made by these witnesses. Thus, in our opinion, the finding recorded by the learned trial Court having doubt about the presence of these two witnesses cannot be said to be perverse.

So far as the statement of Rehmata (P.w.2) is concerned, according to his statement, Lal Singh caused a blow by axe to Azim on his left side of ribs. Though, this fact was not narrated in the First Information Report, because what has been stated in the FIR is that accused charged deceased by lathis and axe, but particular weapon has not been assigned to the accused. Thus, there is clear improvement in the statement of Rehmata. If the statement of said witness is seen in reference to medical evidence, then, it is found that the injury reported in the post-mortem report exists on the right side of the chest and not on the left side. Further, said injury is not attributed by an axe or a Dharia as the injury reported in the post-mortem report shows bruise on the right side of upper part of chest. Thus, in our opinion, the statement of Rehmata is not corroborated, even by

the medical evidence, apart from the fact that the same is not even corroborated by any other witness as it being a case of doubtful presence of two other eye witnesses. Therefore, statement of Rehmata also becomes doubtful.

So far as the act of accused Bhakhar Singh is concerned, taking note of the statement of witnesses and medical evidence, one injury was found on the thigh and thereby the accused was convicted by the trial Court itself and we do not find it to be a case where witness can be convicted under Sections 302 and 302/34 of IPC.

We have further considered as to whether the accused were having any motive to commit a crime of the nature indicated. The complainant tried to project that on account ofhis acting as informer to the police and complaining against the accused with regard to their smuggling activities, they were having intention and motive to kill him. However, this fact could not be proved by leading a proper evidence. So far as other facts pertaining to inter se dispute and initiation of case, we find that the said case is mainly against other persons. Thus, even the motive of the accused could not be established by the prosecution. Even as per the statement of Rehmata, the accused were having intention to kill him and not to his father. Thus,

accuseds' intention to kill deceased Azim has not been even established. In view of these facts, we find that the judgment of the trial Court is based on sound reasonings and thus, cannot be said to be perverse. In our opinion, the trial Court recorded its finding after proper examination of material available on record. Therefore, we are not in agreement with the arguments raised by the learned Public Prosecutor.

In view of the above discussions, we not inclined to interfere with the judgment of the learned trial Court. The appeal of the State Government is, accordingly, dismissed.

(MUNISHWARNATH BHANDARI),J.(BHAGWATI PRASAD),J

scd.